

Nos. 18-1161, 18-1182

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UPS GROUND FREIGHT, INC.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 773**
Intervenor

**ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Petitioner/Cross-Respondent)	Nos. 18-1161, 18-1182
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	04-CA-205359
)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS, LOCAL UNION NO. 773)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Intervenor

UPS Ground Freight, Inc. (“the Company”) was the respondent before the Board in the unfair-labor-practice proceeding on review and is the Petitioner/Cross-Respondent in this court proceeding. The Board’s General Counsel was a party before the Board in the unfair-labor-practice proceeding. International Brotherhood of Teamsters, Local Union No. 773 (“the Union”) was the charging party before the Board in the unfair-labor-practice proceeding, and is the Intervenor in this court proceeding. Amici curiae in support of the Company in

this court proceeding are Coalition for a Democratic Workplace et al., and the Chamber of Commerce of the United States.

B. Rulings Under Review

This case is before the Court on the Company's petition for review of an unfair-labor-practice Decision and Order of the Board, issued on June 1, 2018, and reported at 366 NLRB No. 100. The Board seeks full enforcement of that Order. The Board's Order is based, in part, on findings made in an underlying representation (election) proceeding, and thus the record in that proceeding is also before the Court. 29 U.S.C. § 159(d). The Board's Decision on Review and Order in the underlying representation proceeding issued on July 27, 2017, and is reported at 365 NLRB No. 113.

C. Related Cases

The case on review was not previously before this Court or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

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Dated at Washington, D.C.
this 13th day of February, 2019

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GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. §§ 151, <i>et seq.</i>
Board	National Labor Relations Board
Company	UPS Ground Freight, Inc.
Union	International Brotherhood of Teamsters, Local Union 773
Regional Director	Acting Regional Director Harold A. Maier
JA	Joint Appendix
Br.	UPS Ground Freight, Inc.'s Opening Brief
CDW Amici Br.	Coalition for a Democratic Workplace <i>et al.</i> Amici Brief
Chamber Amicus Br.	Chamber of Commerce of U.S. Amicus Brief

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**ON PETITION FOR REVIEW AND
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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of UPS Ground Freight, Inc. (“the Company”) for review, and the cross-application of the National Labor

Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on June 1, 2018, and reported at 366 NLRB No. 100. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final with respect to all parties, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings. International Brotherhood of Teamsters, Local Union No. 773 (“the Union”) intervened in support of the Board.

The Board’s Order is based, in part, on findings made in an underlying representation (election) proceeding (Board Case No. 04-RC-165805), and thus the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d); *see Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board’s actions in the representation proceeding for the limited purpose of “enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board.” 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the Court’s rulings. 29 U.S.C. § 159(c); *see Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUES

The Company has refused to recognize or bargain with the union that its employees overwhelmingly chose as their representative by a vote of 27 to 1 in a Board-supervised election. The ultimate issue is whether the Board properly found that the Company's refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1). That finding depends on the validity of the Union's certification as representative, which depends, in turn, on the resolution of the following issues raised by the Company:

1. Whether the Board reasonably found that the Company failed to rebut the presumptive appropriateness of a single-facility bargaining unit at its Kutztown, Pennsylvania distribution center.
2. Whether the Board reasonably overruled the Company's election objections relating to driver Frank Cappetta without a post-election hearing.
3. Whether the Board reasonably found that the Regional Director acted within his discretion when applying the Board's Rules and Regulations during the representation proceeding.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the attached Addendum.

STATEMENT OF THE CASE

As noted, this unfair-labor-practice case concerns the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by admittedly refusing to recognize or bargain with the Union as the certified representative of a unit of the Company's employees. The question before the Court is whether the Union's certification was proper based on the Board's findings and procedural rulings in the representation proceeding.

I. STATEMENT OF FACTS

A. Background; the Company's Contract with Advance Auto Parts

The Company is a subsidiary of United Parcel Service, Inc., that provides transportation and delivery services throughout the United States. (JA.666-67, 1134-35; JA.18-19.)¹ Pursuant to a contract with its customer, Advance Auto Parts, the Company transports products from nine distribution centers to retail stores nationwide. (JA.666-67; JA.19-23.) The Company's contract with Advance Auto Parts is administered by a centralized management team. (JA.666-67; JA.24-27.)

In addition to the Kutztown, Pennsylvania distribution center at issue in this case, the Company operates out of facilities in Connecticut, Florida, Georgia,

¹ "JA" references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to the Company's opening brief.

Kansas, Mississippi, North Carolina, Ohio, and Virginia, which are between 250 and 1,265 miles from Kutztown. (JA.666-67, 676; JA.23.) Each distribution center covers a distinct geographic area, and the centers' respective delivery territories do not overlap. (JA.667; JA.79-80.)

Across all nine distribution centers, the Company employs approximately 290 drivers. (JA.667; JA.39.) The drivers share skills and perform functions that are essentially identical. (JA.672; JA.38.) Recordkeeping functions for the Company's drivers are centralized at its headquarters, and drivers are all subject to the same general personnel policies, wage-and-benefit structures, performance criteria, and work guidelines. (JA.669-71, 677; JA.46-47, 51, 75-76, 105.) Drivers at the various distribution centers have virtually no contact with drivers from other facilities. (JA.673; JA.95, 247-48.)

Each distribution center is run by a local management team, including an operations manager and an operations supervisor. (JA.667; JA.28-31.) The Company's centralized recruiting department screens job applicants, and then local managers review the applications, interview and test prospective drivers, and make the final hiring decisions. (JA.671; JA.113-14.) Local managers are responsible for the day-to-day supervision of drivers and for monitoring their performance: they regularly test, train, and evaluate the drivers. (JA.670-71; JA.44.) Scheduling, leave requests, disputes over assignments, and similar issues are

resolved locally. (JA.670; JA.123-24.) Local managers also independently address disciplinary problems, maintain drivers' disciplinary files, and issue oral and written warnings. (JA.670-71; JA.38, 50, 81-82, 106-07.) The local managers are responsible for recommending suspensions and terminations, which require higher approval from central management before being implemented. (JA.671; JA.79, 107-10.)

B. The Kutztown Distribution Center

The Kutztown distribution center is responsible for a delivery territory that includes central Pennsylvania, New Jersey, New York, and Delaware. (JA.667.) At the time of the election in this case, the Company employed approximately thirty drivers at the Kutztown facility. (JA.667-68; JA.222.) Drivers report to work at staggered times between 12:00 a.m. and 8:00 a.m., and return to the facility between 7:00 a.m. and 7:00 p.m. (JA.667; JA.130-32.) Their delivery routes range from 150 to 600 miles, and most of the Company's tractor-trailers contain a bunk for overnight runs. (JA.667; JA.33, 131, 320.)

Although they are subject to the same pay structure as drivers at facilities in other geographic regions, the Kutztown drivers receive higher mileage rates. (JA.670-72; JA.77-78, 96-99.) Unlike the Company's other distribution centers, the Kutztown facility has an off-site center for product returns approximately ten

miles away, which creates additional job duties for the Kutztown drivers. (JA.672; JA.41-43, 166-67, 249.)

Over the three years prior to the hearing in this case, a small percentage of the work at the Kutztown facility was performed by temporarily transferred drivers from other facilities. (JA.675; JA.67-68, 221-22, 290-91, 497.) Over the five years prior to the hearing, sixteen non-supervisory employees permanently transferred to or from the Kutztown facility. (JA.676; JA.298-305, 498.) All but four such transfers occurred less than one month after hire, and at least some were the result of temporary training assignments. (JA.676; JA.298-305, 498.)

C. The Job Duties of Frank Cappetta

One of the drivers employed by the Company at the Kutztown facility, Frank Cappetta, performs several functions. Cappetta spends approximately eighty percent of his time working as a dispatcher, ten percent as a certified safety instructor, and ten percent as a road driver. (JA.1026; JA.190, 216-19.) When working as a dispatcher, Cappetta receives emails from Advance Auto Parts providing a detailed schedule of routes and stops to be made on those routes. (JA.1026; JA.219-21.) The majority of the Kutztown drivers, approximately twenty-five out of thirty, are permanently assigned to particular routes. (JA.668, 1026; JA.222-23.) Cappetta matches the remaining drivers to unclaimed routes. (JA.1026; JA.223.) In doing so, Cappetta primarily relies on the preferences

expressed by the drivers themselves, although he occasionally considers a driver's known skills, such as whether a route that involves driving into New York City should go to an experienced "city driver." (JA.1026; JA.223-24, 236-38, 272-73, 311.) If a driver objects to a route, then Cappetta can switch that driver to another route. (JA.1026; JA.223-24, 269.) If a driver objects to the only route available, then Cappetta must refer the driver to a management official to resolve the dispute. (JA.1026; JA.224, 235-36, 269-70, 276-77.)

As a dispatcher, Cappetta is also required to note "call outs" when drivers are on vacation or sick leave, and to transfer those drivers' routes to available drivers while balancing driver workloads. (JA.1026; JA.183, 278-79.) Cappetta does not approve leave requests, which drivers must submit to the local managers. (JA.1026; JA.244-46, 278.) When Advance Auto Parts schedules more routes than there are available drivers, the Company will bring in temporary drivers from a third-party provider. (JA.1026; JA.226.) Cappetta is required to notify the Kutztown operations supervisor when temporary drivers are needed, and the operations supervisor then contacts the third-party provider. (JA.1026; JA.226, 229-30.) There was a brief period of time in mid-2015 when, due to the absence of an operations supervisor at the Kutztown facility, Cappetta was authorized to contact the provider directly. (JA.1026 & n.2; JA.229-31.)

When working as a certified safety instructor, Cappetta administers road tests for potential hires, as well as drivers' semi-annual safety tests. (JA.1027; JA.232-34.) Cappetta reports the results of those tests to management, and has no further involvement in the hiring process. (JA.1027; JA.232-33, 248-49.) Cappetta cannot discipline other drivers or review their work. (JA.1025-27.) Other drivers at the Kutztown facility also spend part of their time working as certified safety instructors. (JA.678.)

II. PROCEDURAL HISTORY

A. The Union's Petition; the Pre-Election Hearing

On December 10, 2015, the Union filed a petition with the Board's Region 4 in Philadelphia seeking a representation election among all full-time and regular part-time drivers at the Kutztown distribution center. (JA.504.) The same day, the Regional Director scheduled a pre-election hearing for Friday, December 18, which in turn required the Company to file a statement of position by Thursday, December 17. (JA.511.) Five days later, on December 15, the Company filed a motion requesting a two-business-day postponement such that the statement of position would be due Monday, December 21, and the hearing would occur Tuesday, December 22. (JA.519-21.) According to the Company's motion, the attorney who filed the motion was traveling and would be unavailable to meet with company representatives until the following day, and the timing of the petition was

burdensome due to the Company's significant holiday delivery commitments.

(JA.520.) The Company's motion did not provide any additional explanation as to why it needed additional time to prepare. (JA.519-21.) The petitioner Union opposed the motion. (JA.521.) The following day, the Acting Regional Director² granted the Company's motion in part and ordered a one-business-day postponement, such that the hearing was rescheduled to Monday, December 21, and the statement of position was due Friday, December 18. (JA.523.)

The Company filed its statement of position on December 18, and the pre-election hearing was held before a Hearing Officer on December 21. (JA.1.) The Hearing Officer indicated at the start of the hearing that post-hearing briefs would only be available upon the special permission of the Regional Director. (JA.12.) During the hearing, the parties fully litigated the supervisory status of Cappetta. (JA.1025; JA.14, 124-293.) They were not permitted to litigate whether drivers in two disputed classifications, dispatcher and certified safety instructor, should be excluded from the unit. (JA.795; JA.13-14.) Near the end of the eight-hour hearing—which the Hearing Officer had continued past 6:00 p.m. without objection from either party—counsel for the Company requested that the parties reconvene the following morning for the sole purpose of presenting closing statements. (JA.329-30.) The Hearing Officer denied that request and offered the

² Hereinafter “Regional Director,” for ease of reference.

parties thirty minutes to prepare closing statements, after which the Company used its closing statement to argue that it was being treated unfairly. (JA.329-50.)

B. The Mail-Ballot Election; the Union's Election Victory and Certification; the Company's Refusal to Bargain

On January 5, 2016, the Regional Director issued a Decision and Direction of Election finding that a single-facility unit at the Kutztown distribution center was appropriate and directing a mail-ballot election. (JA.666-83.) The Regional Director did not resolve whether Cappetta was a statutory supervisor, or whether dispatchers and safety instructors should be excluded from the unit, because those issues could not significantly affect the size or character of the unit. (JA.678.) The Company filed a request for review of the Regional Director's decision to direct a mail-ballot election, which the Board denied. (JA.749.)

The Board-supervised election was held between January 11 and January 29, 2016. (JA.681.) Two employees in the disputed classifications, including Cappetta, were permitted to vote under challenge. (JA.681, 790.) Thirty out of thirty-two eligible voters cast ballots, and—by a vote of 27 to 1—the employees voted in favor of representation by the Union. (JA.790.) The two challenged ballots were not opened or counted because they could not affect the election result. (JA.790.) Following the election, the Company requested the issuance of investigatory subpoenas, and the Regional Director denied that request given the absence of a scheduled hearing. (JA.752, 796-97.) The Company filed objections

to the election and a supporting offer of proof. (JA.791.) On March 11, 2016, the Regional Director issued a Supplemental Decision on Objections, rejecting the Company's post-election objections without a hearing and certifying the Union as the exclusive bargaining representative of the employees. (JA.790-98.) The two disputed classifications were neither included in, nor excluded from, the unit. (JA.798 n.5.) The Company filed a request for review with the Board challenging the Union's certification and raising a variety of arguments, including contesting the appropriateness of the bargaining unit, the status and conduct of Cappetta, and various procedural rulings made by the Regional Director. (JA.1025.)

On July 27, 2017, the Board (Members Pearce and McFerran; Chairman Miscimarra, dissenting in part) issued a Decision on Review and Order granting in part the Company's request for review as to Cappetta's supervisory status. (JA.1025.) On review, the Board found that Cappetta was not a statutory supervisor, and that, in the alternative, the Company failed to show objectionable conduct. (JA.1025-27.) The Board otherwise denied the Company's request for review, and expressly affirmed the Regional Director's rulings. (JA.1025 n.1.)

In August 2017, the Union made a formal request to bargain, and the Company stated that it would not recognize or bargain with the Union. (JA.1135.) The Board's General Counsel issued an unfair-labor-practice complaint, and subsequently moved for summary judgment. (JA.1133.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On June 1, 2018, the Board (Chairman Ring; Members Pearce and McFerran) granted the General Counsel's motion for summary judgment and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize or bargain with the Union. (JA.1133-35.) The Board found that all representation issues raised by the Company were or could have been litigated in the underlying representation proceeding. (JA.1133.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act. (JA.1135.) Affirmatively, the Board's Order requires the Company to, on request, recognize and bargain with the Union as the exclusive representative of employees in the certified unit, and to post a remedial notice. (JA.1135-36.)

SUMMARY OF ARGUMENT

This case involves a unit of the Company's drivers who have sought to exercise their rights under federal law by voting, in near unanimity, to be represented by the Union in collective bargaining. Nearly three years later, the Company still refuses to recognize or bargain with the Union.

On review, the Company only briefly addresses the substantive merits of the underlying certification, and largely ignores the detailed analysis provided by the

Board and the Regional Director. The Board reasonably found that the Company failed to rebut the presumptive appropriateness of a single-facility unit at the Kutztown facility, which was petitioned for by the Union on behalf of the employees. Despite fully litigating the issue at the pre-election hearing, the Company did not carry its heavy burden of showing that the *only* appropriate unit was instead a multi-facility unit involving nine facilities hundreds of miles apart and composed of distinct local workforces that have virtually no routine contact or interaction with each other.

The Board further reasonably found that the Company failed to carry its burden to show that driver Frank Cappetta was a statutory supervisor, again despite fully litigating the issue at the hearing. Remarkably, the Company based its substantive objections to the conduct of the election solely on its unsubstantiated speculation that, as a putative supervisor, Cappetta theoretically *could have* solicited union authorization cards from other employees. The Board acted well within its discretion in overruling such objections given that Cappetta was not a supervisor and given that the Company did not proffer a single specific allegation of objectionable conduct. Rather, the only evidence proffered by the Company was hearsay testimony from a non-unit employee about Cappetta allegedly stating that he and other drivers were trying to unionize, and testimony from a supervisor who allegedly observed a missed call from a union organizer on Cappetta's

cellphone the day after the Union received a Board-ordered voter list containing employees' cellphone numbers. Neither incident would have been objectionable even assuming, in the alternative, that Cappetta was a supervisor.

The Company focuses much of its attention on arguing that the Regional Director abused his discretion under the Board's Rules and Regulations while overseeing the representation proceeding. The Company, however, expressly states that it does not challenge the facial validity of the governing Rules and Regulations. Tellingly, the Company barely acknowledges a central requirement of an alleged abuse of discretion: a showing of actual prejudice. All of the rulings at issue were reasonable and well within the discretion of the Board and the Regional Director—and, in any event, the Company has failed to show that it was prejudiced by any of those rulings. The Board's representation proceedings are non-adversarial, and the Company had a full opportunity to present evidence and to litigate all material issues.

This Court has historically expressed grave concern over employers that disregard their “solemn obligations” under the Act by utilizing delay tactics or refusing to bargain based on arguments that are without merit. *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 426 F.2d 1243, 1249-50 (D.C. Cir. 1970); *cf. E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445-46 (D.C. Cir. 1996). Many of the Company's arguments in the present case warrant such opprobrium.

ARGUMENT

THE COMPANY VIOLATED THE ACT BY REFUSING TO RECOGNIZE OR BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), when it refuses to recognize or bargain with the duly certified bargaining representative of its employees. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 961-62 (D.C. Cir. 1999). The Company has admittedly refused to recognize or bargain with the Union in order to contest the Board's certification of the Union as the exclusive representative of the drivers at the Kutztown distribution center, despite the drivers overwhelmingly voting in favor of union representation. Thus, assuming the Court upholds the Board's certification of the Union, the Company has violated the Act. *Id.*

In contesting the Union's certification, the Company makes two substantive arguments: first, that the single-facility unit certified by the Board was inappropriate; and second, that driver Frank Cappetta was a statutory supervisor whose suspected pro-union sympathies tainted the results of the election. The Company also makes numerous procedural arguments regarding the Regional Director's rulings during the representation proceeding. As shown below, the Company's arguments are wholly without merit.

A. The Board Reasonably Found That the Company Failed To Rebut the Presumptive Appropriateness of a Single-Facility Unit at the Kutztown Distribution Center

Section 9(a) of the Act provides for the selection of an exclusive bargaining representative by the majority of employees in “a unit appropriate for such purposes.” 29 U.S.C. § 159(a). Section 9(b) vests in the Board the authority to determine “the unit appropriate for the purposes of collective bargaining,” in order to assure to employees “the fullest freedom in exercising the rights guaranteed by [the Act].” 29 U.S.C. § 159(b). Congress thus granted the Board broad discretion in order to ensure “flexibility in shaping the bargaining unit to the particular case.” *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985). In accordance with the Act, “the Board need only select *an* appropriate unit, not *the most* appropriate unit.” *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 38 (D.C. Cir. 2015).

When a union files a petition seeking to represent a unit of employees at a single facility in an employer’s multi-facility operation, the Board has long maintained that the single-facility unit is presumptively appropriate. *J&L Plate, Inc.*, 310 NLRB 429, 429 (1993); *see Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009); *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1085-86 (D.C. Cir. 2003). The party opposing the single-facility unit carries the “heavy burden” of producing affirmative evidence to rebut the unit’s presumptive appropriateness. *Catholic Healthcare W.*, 344 NLRB 790, 790 (2005); *J&L Plate*,

310 NLRB at 429; *see Cmt. Hosps.*, 335 F.3d at 1085. A multi-facility unit will only be required upon a showing that the single facility “has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity.” *Dean Transp.*, 551 F.3d at 1063; *J&L Plate*, 310 NLRB at 429. The Board considers factors such as: (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) the similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between locations; and (5) the parties’ bargaining history, if any. *J&L Plate*, 310 NLRB at 429.

Determining on a case-by-case basis whether a particular unit is appropriate necessarily involves “a large measure of informed discretion,” and the Board’s determinations are “rarely to be disturbed.” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). The Court will uphold the Board’s unit determinations unless “arbitrary” or based on factual findings “not supported by substantial evidence in the record.” *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 420 (D.C. Cir. 2008).

Here, the Board’s analysis of the appropriateness of a single-facility unit at the Kutztown distribution center (JA.669-77, 1025 n.1) is consistent with settled precedent and supported by substantial evidence in the record. The Company

failed to carry its burden of rebutting the presumptive appropriateness of the Kutztown single-facility unit by demonstrating that the *only* appropriate unit was a multi-facility unit including several hundred drivers at all nine distribution centers servicing the Advance Auto Parts contract. Accordingly, the Board acted within its broad discretion in approving the petitioned-for unit.

The Board first found that the Company's centralized control over "many aspects of personnel and labor relations for all nine facilities" is insufficient to rebut the single-facility presumption, because the local managers at the Kutztown facility exercise significant autonomy over the day-to-day work of the drivers at that facility. (JA.669-72.) *See Dean Transp.*, 551 F.3d at 1064 (upholding single-facility unit where employer maintained "highly centralized operation" but onsite supervisors oversaw drivers' day-to-day work). Among other things, the local managers make final hiring decisions, issue discipline short of suspension without oversight, recommend suspensions and terminations, schedule and assign drivers' work and leave, train and monitor drivers, and resolve day-to-day problems. *See D&L Transp., Inc.*, 324 NLRB 160, 160-61 (1997) (directing single-facility unit where local managers' control over hiring, assignments, time off, and minor discipline outweighed centralized administration); *cf. Jerry's Chevrolet, Cadillac, Inc.*, 344 NLRB 689, 691 n.9 (2005) (rejecting single-facility unit, but noting one

would be appropriate if local managers were responsible for scheduling, assignments, vacations, sick leave, and addressing minor disciplinary problems).

The Board also explained that the lack of functional integration between the Company's distribution centers weighs in favor of a single-facility unit. (JA.672-73.) The distribution centers do not have overlapping delivery territories, and the Kutztown drivers have virtually no contact with drivers from other facilities, which service different areas of the country often hundreds of miles away. In short, the drivers do not contribute to different stages of a single work process. *See Rental Unif. Serv., Inc.*, 330 NLRB 334, 336 (1999) (finding single-facility presumption unrebutted where employees performed same job but did not "interact with [employees at other facilities] to perform their jobs or on any regular basis"); *cf. Prince Telecom*, 347 NLRB 789, 792-93 (2006) (noting inter-facility employee contact as key consideration, and directing multi-facility unit based on facility's integration into one of two distinct service networks).

Likewise, the Board found insufficient evidence of significant employee interchange to require broadening the unit beyond the Kutztown facility. (JA.673-76.) As an initial matter, the Company failed to make the required showing not only that there was interchange but also that it affected a significant percentage of the total amount of work performed. *New Britain Transp. Co.*, 330 NLRB 397, 398 (1999). The Board reasonably inferred from the limited evidence in the record

that temporary transfers accounted for, at most, five percent of the Kutztown facility's operations, and roughly one percent of the Company's operations across all nine distribution centers. (JA.675.) That level of interchange is far below the amount required to rebut the single-facility presumption. *New Britain Transp.*, 330 NLRB at 398 (citing cases). In addition, there were just sixteen non-supervisory permanent transfers at the Kutztown facility over a five-year period, and some of those "transfers" involved new hires who were at the facility solely for training. (JA.676.) *See Red Lobster*, 300 NLRB 908, 911 (1990) (finding permanent transfers less significant and describing eleven transfers in one-year period as "minimal").

The Board acknowledged that one relevant factor, the similarity of drivers' skills and functions, supports a multi-facility unit. (JA.672.) The Board reasonably found, however, that the other factors—including local control over day-to-day work, and lack of substantial interchange or integration with other facilities—outweigh the similarity of skills and functions. In addition, there are certain working conditions unique to the Kutztown facility, including a higher mileage rate and additional job duties, which diminish the significance of the drivers' shared skills and functions. (JA.672.)

Finally, the Board emphasized that, while not always dispositive, the fact that the Kutztown facility is hundreds of miles from the other eight distribution

centers strongly supports a single-facility unit. (JA.676.) The substantial distances involved, and the lack of functional integration or regular contact with other drivers, reinforces the appropriateness of a unit among the Kutztown drivers. *E.g.*, *Rental Unif. Serv.*, 330 NLRB at 336 (relying on distances of twenty-two and fifty miles in support of single-facility unit); *cf. Jerry's Chevrolet*, 344 NLRB at 690-91 (stressing close proximity of facilities, such that employees used same parking lot, in rejecting single-facility unit).

In its brief to the Court (Br. 63-66), the Company largely ignores the Board's detailed analysis. Instead, it merely repeats factual considerations that were fully addressed in the Decision and Direction Election (JA.669-76), without rebutting that analysis or providing any supporting authority.³ Moreover, even if the Company had shown that a multi-facility unit involving facilities thousands of miles apart was "equally or more appropriate," it would not establish that the petitioned-for Kutztown unit was "truly inappropriate," as required to warrant

³ The Company has thus waived any response to the Board's analysis on these points and should not be permitted to raise new arguments in its reply brief. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (holding that arguments not raised in opening brief are deemed waived).

overturning the Board's unit determination. *Country Ford Trucks*, 229 F.3d at 1189-91.⁴

B. The Board Reasonably Overruled the Company's Election Objections Relating to Driver Frank Cappetta Without a Post-Election Hearing

In addition to affirming the appropriateness of the single-facility unit, the Board also reasonably overruled the Company's objections regarding driver Frank Cappetta without holding a post-election hearing. Cappetta's supervisory status was fully litigated at the pre-election hearing, and the Board ultimately found that Cappetta was not a supervisor whose conduct could have coerced voters or tainted the election. That finding alone disposes of the substantive and procedural objections relating to his purported misconduct. In the alternative, however, the Board found that—even assuming Cappetta *was* a supervisor—the Company failed to proffer any evidence substantiating its vague claims of misconduct. The Board then reasonably rejected the Company's additional objections relating to Cappetta, which are based on meritless procedural arguments.

⁴ For the reasons discussed further below, *see* pp. 44-51, the Company's bare assertions that the Regional Director and the Hearing Officer only permitted a "partial record" to be established (Br. 63), and that it was prevented from presenting "additional evidence" (Br. 9), are false. The Company fails to identify any evidence regarding the appropriateness of the single-facility unit that it was unable to introduce at the pre-election hearing or any arguments that it was unable to fully present to the Board.

Congress has entrusted the Board with an especially “wide degree of discretion” in establishing “the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996). The party seeking to overturn an election bears a “heavy burden,” and the Court will overturn the Board’s decision to certify an election’s results “in only the rarest of circumstances.” *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 386 (D.C. Cir. 2017).

It is well established that an objecting party does not have an absolute right to a post-election objections hearing. *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970). Instead, to justify such a hearing, the burden is on the objecting party to proffer evidence raising “substantial and material factual issues” that could constitute grounds for setting aside the election. 29 C.F.R. § 102.69(c)(1); *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016); *Amalgamated Clothing Workers*, 424 F.2d at 828. Thus, when the proffered evidence, even if credited, would not justify setting aside the results of the election as a matter of Board law, a post-election hearing is not warranted and the objections should be overruled. *Durham Sch. Servs.*, 821 F.3d at 58.

The Court reviews the Board’s decision to overrule election objections without holding a post-election hearing only for an abuse of discretion. *Canadian*

Am. Oil, 82 F.3d at 473. The abuse-of-discretion standard is “highly deferential.” *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1245 (D.C. Cir. 2018). That is particularly true here, given the substantial deference afforded to the Board in the context of representation proceedings. In order to establish an abuse of discretion, there must be a showing of actual prejudice. *Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 87-88 (D.C. Cir. 2018); *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 67 (D.C. Cir. 2015); *see also* 5 U.S.C. § 706 (requiring “due account . . . of the rule of prejudicial error”). It is well established that “[t]he burden of showing prejudice from assertedly erroneous rulings is on the party claiming injury.” *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 123 (D.C. Cir. 2001).

1. The Company failed to establish that Cappetta was a statutory supervisor

In order to establish that an employee constitutes a “supervisor” within the meaning of Section 2(11) of the Act, the party alleging such status must demonstrate: (1) that the individual has authority to engage in any one of the twelve supervisory functions listed in the statute, which includes the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust the grievances of other employees, or “effectively to recommend” such actions; (2) that the employee’s exercise of such authority requires the use of “independent judgment”; and (3) that the employee’s authority is held “in the interest of the employer.” *NLRB v. Ky. River Cnty. Care*,

Inc., 532 U.S. 706, 713 (2001) (quoting 29 U.S.C. § 152(11)). Congress took “great care” to distinguish between “true supervisors vested with ‘genuine management prerogatives,’” and lead employees “who are protected by the Act even though they perform ‘minor supervisory duties.’” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687-88 & n.15 (2006) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)). The Board “must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their [statutory] rights.” *Beverly Enters.-Mass.*, 165 F.3d at 963.

An employer asserting supervisory status and attempting to preclude one of its workers from enjoying rights under federal labor law carries the burden of proof. *Ky. River*, 532 U.S. at 711-12. Conclusory evidence unsupported by specific examples is insufficient to establish supervisory authority. *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 729 (2006); *see Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (requiring “tangible examples”). As such, “[s]tatements by management purporting to confer authority do not alone suffice.” *Beverly Enters.-Mass.*, 165 F.3d at 963. Moreover, an employer does not carry its burden of proof if the record evidence remains in conflict or is otherwise inconclusive. *Salem Hosp.*, 808 F.3d at 69. The Board’s determinations with regard to supervisory status are entitled to “special weight,”

and the Court will affirm them if they have warrant in the record and reasonable basis in law. *Desert Hosp. v. NLRB*, 91 F.3d 187, 193 (D.C. Cir. 1996).

In the present case, Board reasonably rejected the Company's assertion that Cappetta was a supervisor. (JA.1025-27.) The Board first found insufficient evidence that Cappetta had supervisory authority to assign work to other drivers using independent judgment within the meaning of the Act. (JA.1026.) Under Section 2(11), the term "assign" refers to the act of designating an employee to a place, appointing an employee to a time, or "giving significant overall duties." *Oakwood Healthcare*, 348 NLRB at 689. The party alleging supervisory status must show that the putative supervisor has the authority to independently *require* employees to accept assigned duties, not merely to *request* that such duties be accepted. *Golden Crest Healthcare*, 348 NLRB at 729.

As the Board explained (JA.1026), Cappetta received detailed route schedules from the Company's customer, Advance Auto Parts. Although the majority of the drivers were permanently matched to particular routes, Cappetta matched unclaimed routes to drivers as necessary, including when regular drivers were on leave, primarily by relying on the drivers' own preferences. Contrary to the Company (Br. 60), Cappetta himself could not require a driver to accept a particular route: if a driver objected to one, Cappetta would switch that driver to a different route or "direct the driver to a management official for resolution of the

dispute.” (JA.1026.) *See, e.g., NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 15-16 (1st Cir. 2015) (affirming lack of supervisory assignment authority where dispatchers could ask employees to work overtime but, if employees objected, could not require overtime without consulting management).⁵

Moreover, even assuming that Cappetta “assigned” work, the Board reasonably found that he did not do so with the independent judgment required to confer supervisory status. Cappetta relied primarily on drivers’ own preferences in distributing routes, though he occasionally considered drivers’ known skills, such as matching city routes to “city driver[s]” (JA.311) who were comfortable with urban driving. As the Board explained (JA.1026), however, distributing predetermined duties to employees based on their “known skill[s] or experience” does not involve independent judgment within the meaning of the Act. *Cranesville Block Co. v. NLRB*, --- F. App’x ---, 2018 WL 5919224, at *1 (D.C. Cir. Oct. 30, 2018); *Shaw, Inc.*, 350 NLRB 354, 355-56 & n.9 (2007); *see S.D.I. Operating Partners, LP*, 321 NLRB 111, 111 (1996) (finding no independent judgment in assigning employees based on “skills they [had] previously demonstrated,” while

⁵ Cappetta’s brief role in requesting temporary drivers from a third-party provider did not involve “assigning” work to coworkers using independent judgment. (JA.1026 & n.2.) In any event, supervisory authority that is no longer in effect is not controlling. *E.g., Passaic Daily News v. NLRB*, 736 F.2d 1543, 1550 (D.C. Cir. 1984).

“inquiring of the employees, as needed, whether a particular job [was] within their expertise”).

The Board also reasonably rejected the Company’s contention that Cappetta had the authority “effectively to recommend” hiring decisions within the meaning of the Act. (JA.1026.) Cappetta was one of several drivers who spent a small portion of their time acting as certified safety instructors and, in connection with that role, he administered road tests to potential hires. Cappetta had no input in the hiring process other than reporting to management whether an applicant had passed or failed the objective road tests. It is well established that the routine act of administering tests to applicants and reporting the results to management does not constitute effectively recommending hiring decisions, much less doing so with the independent judgment necessary to qualify as a statutory supervisor. *E.g., Pac. Beach Corp.*, 344 NLRB 1160, 1161-62 (2005) (finding that administration of diving tests to prospective hires did not constitute supervisory hiring authority).

The Company largely ignores the Board’s detailed findings and analysis regarding Cappetta’s supervisory status, and instead simply repeats transcript citations regarding Cappetta’s various duties, many of which are irrelevant. (Br. 57-59.) The Company relies almost exclusively on the equivocating testimony of supervisor Matt DiBiase, who was new to the job when he testified, and who admitted that he was not completely familiar with Cappetta’s work or the role of

Advance Auto Parts managers. (E.g., JA.126-29, 136-37, 181-84.) DiBiase's testimony was, moreover, devoid of tangible examples and contradicted by Cappetta's own detailed explanation of his job duties. *See Salem Hosp.*, 808 F.3d at 69 (noting that conflicting or inconclusive evidence does not satisfy burden of proof). In any event, the Company provides no developed legal argumentation—for example, in responding to the Board's dispositive finding that Cappetta did not exercise independent judgment—and the Company should not be permitted to “sandbag[]” the Board or the Union by being “obscure on the issue in [its] opening brief” and then “warm[ing] to the issue” in its reply brief. *CTS Corp. v. EPA*, 759 F.3d 52, 60 (D.C. Cir. 2014); *see Corson & Gruman*, 899 F.2d at 50 n.4.⁶

Although irrelevant, the Company also improperly cites uncorroborated assertions made in the offer of proof it filed in support of its post-election objections. (Br. 59-60.) However, the Company sought a post-election hearing to present evidence of Cappetta's allegedly objectionable *conduct*; as the Board found, the parties had already litigated Cappetta's supervisory *status* at the pre-

⁶ Similarly, the Company now makes the conclusory assertions (Br. 59) that Cappetta “directed [employees’] work” and “adjusted grievances” within the meaning of Section 2(11), without providing further explanation or citing applicable caselaw. *See Oakwood Healthcare*, 348 NLRB at 690-92 (setting forth elements of supervisory responsible direction); *Ken-Crest Servs.*, 335 NLRB 777, 779-80 (2001) (discussing supervisory grievance adjustment). There is no allegation that Cappetta exercised any of the other eight statutory indicia of supervisory status.

election evidentiary hearing. (JA.1025.) The Company has never explained why, having “had ample opportunity to present evidence on Cappetta’s supervisory status” (JA.795), it should have been granted a “second bite at the apple” (JA.795) to introduce further evidence that it could have presented the first time. *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1183 (D.C. Cir. 2000) (reaffirming principle that Board need not afford a party “more than one opportunity to litigate any particular issue”); *e.g., NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 490 (6th Cir. 2003) (noting that “the law does not permit yet another bite at the same apple” to relitigate supervisory status in second hearing). Notably, the proffered evidence allegedly showing that employees could not refuse Cappetta’s dispatch assignments (Br. 60) was testimony from DiBiase (JA.777)—a witness who had already been called and thoroughly examined at the pre-election hearing when Cappetta’s supervisory status was being litigated (JA.122-214). The additional claim that Cappetta once used a figure of speech about having “run” the facility in the past (Br. 59) is not probative of anything. In any event, the assertions in the Company’s offer of proof would not alter the Board’s substantive analysis, for the reasons described above.

In sum, despite fully litigating Cappetta’s supervisory status at the pre-election hearing, the Company failed to carry its burden of proving that he was a statutory supervisor rather than an employee.

2. In the alternative, the Company failed to proffer evidence of objectionable conduct

As noted above, the Board initially resolved the Company’s election objections relating to Cappetta on the grounds that he was not, in fact, a statutory supervisor. However, the Board also found, in the alternative, that no hearing was required, because “[e]ven assuming for the sake of argument that Cappetta was a supervisor,” the Company failed to proffer any evidence to show that Cappetta engaged in objectionable conduct that could warrant setting aside the results of the election. (JA.1027.) Accordingly, the Board acted well within its discretion in overruling the Company’s objections without holding a post-election hearing.

A statutory supervisor engaging in pro-union conduct is not per se objectionable—instead, the Board considers, *inter alia*, the nature and extent of supervisory authority possessed, and the nature, extent, and context of the conduct in question. *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004); *see Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1272 (D.C. Cir. 2012). The objecting party must establish not only that objectionable conduct occurred, but also that it interfered with employees’ free choice to such an extent that it “materially affected” the election results. *Harborside Healthcare*, 343 NLRB at 909; *see Veritas Health Servs.*, 671 F.3d at 1272. Pro-union statements by a statutory supervisor, standing alone, do not constitute objectionable conduct. *Veritas Health Servs.*, 671 F.3d at 1272.

In its offer of proof in support of its election objections, and again in its brief to the Court, the Company proffered just two pieces of evidence regarding Cappetta's alleged misconduct. The first was that a temporary administrative assistant from a Kansas distribution center—who was not part of the bargaining unit or eligible to vote—would testify that Cappetta approached her on one occasion, asked her if she knew “what's going on here,” and stated, “[w]e're trying to get a union at this location [the Kutztown distribution center], you may want to share that with your drivers.” (Br. 39, JA.787.) The second was that a supervisor would testify that, as he was returning from lunch in early January 2016, he heard Cappetta's unattended cellphone ring and observed an incoming call from an organizer for the Union. (Br. 39, JA.788.) The sum total of the Company's proffered “evidence” was thus that Cappetta made a non-coercive statement to a single employee who was not part of the bargaining unit, and that Cappetta missed a call on his cellphone from a Union organizer. (JA.1027.)

Cappetta's alleged statement—which purportedly occurred weeks or months before the election—was not even unambiguously pro-union, much less indicative of objectionable misconduct. The Board has consistently found that it is not coercive for a statutory supervisor, particularly a low-level supervisor without disciplinary authority, merely to favor unionization. *Ne. Iowa Tel. Co.*, 346 NLRB

465, 466-67 (2006); *Waldinger Corp.*, 331 NLRB 544, 545-46 (2000), *enforced*, 262 F.3d 1213 (11th Cir. 2001); *accord Veritas Health Servs.*, 671 F.3d at 1272.

The Company is equally brazen to rely on its innocuous claim that Cappetta once received a phone call from the Union. The Company claims that the missed call occurred on January 8 (Br. 39), just one day after the Company had been required to provide the Union with a list of prospective voters *and personal cellphone numbers* for the purpose of campaigning (JA.682). In any event, for the Company to insist that a prospective voter receiving a call from the Union is evidence of the voter's status as a covert agent for the Union is absurd.

Furthermore, even if the Company had proffered evidence of supervisory conduct that could be deemed objectionable, it failed to show conduct that would have "materially affected" the outcome so as to warrant setting aside the election results. *Veritas Health Servs.*, 671 F.3d at 1272; *Harborside Healthcare*, 343 NLRB at 909. Here, employees overwhelmingly chose the Union by a vote of 27 to 1, and the Company has not proffered evidence that a single eligible voter was aware of Cappetta's alleged support for the Union. Moreover, the Company had sufficient time prior to the election to counteract any hypothesized coercion. *See, e.g., Talladega Cotton Factory, Inc.*, 91 NLRB 470, 472 (1950) (finding that employer with knowledge of supervisor's pro-union conduct has obligation to dissipate any alleged coercive effects prior to election). Unlike the case cited by

the Company (Br. 50-51), in which the court held that the employer proffered circumstantial evidence of a complex hiring scheme that would have constituted objectionable conduct if proven, *Jam Prods., Ltd. v. NLRB*, 893 F.3d 1037, 1042-46 (7th Cir. 2018), here the Company based its objections entirely on “vague, unsubstantiated accusations,” *id.* at 1045, which would not warrant a different outcome even if true.

In sum, the Company failed to establish material questions of fact warranting a post-election objections hearing, and the Board reasonably overruled the Company’s objections and upheld the certification of the Union.

3. The Company’s procedural objections relating to Cappetta are without merit

The Company also argues that the Regional Director abused his discretion in making several procedural rulings relating to Cappetta’s conduct or status. If the Court affirms the Board’s initial finding as to Cappetta’s supervisory status, then the Company’s claims are irrelevant. Even if Cappetta *were* a supervisor, the Company’s arguments are without merit for the reasons discussed below.

a. The Regional Director had no obligation to independently investigate the Company’s baseless allegations of misconduct

As the Board found (JA.1025 n.1), the Regional Director fully considered the negligible evidence of objectionable conduct proffered by the Company, and reasonably concluded that the Company’s proffer did not justify a post-election

hearing. Nonetheless, the Company makes the extraordinary suggestion that the Regional Director should have affirmatively sought out evidence in support of the Company's uncorroborated suspicions. In particular, the Company contends that the Regional Director was required to contact employees and formally "review" all of the signed authorization cards submitted by the Union in support of its election petition to "ascertain whether Cappetta had witnessed card signings."⁷ (Br. 40.) In making that argument, the Company ignores the applicable burden of proof for post-election objections and confuses distinct aspects of the Board's representation proceedings.

While it is true that, under certain circumstances, a supervisor's pre-petition solicitation of authorization cards may be grounds for subsequent objections to the validity of the election itself, *Harborside Healthcare*, 343 NLRB at 911-13, the Board's regional directors have no obligation to gather evidence in support of the employer's effort to overturn an election, *see* 29 C.F.R. § 102.69(a), (c)(1)(i) (placing burden on objecting party to provide offer of proof justifying hearing); *Durham Sch. Servs.*, 821 F.3d at 58 (same). In order to justify a post-election

⁷ A union filing a representation petition seeking an election is required to include a "showing of interest" demonstrating that a sufficient number of employees support an election, which often involves the presentation of signed authorization cards. *See* 29 C.F.R. § 102.61(a)(7), (f); NLRB Casehandling Manual, Part Two: Representation Proceedings § 11020 (2017), *available at* <https://www.nlrb.gov/reports-guidance/manuals>.

hearing, the objecting party must itself proffer “specific evidence which *prima facie* would warrant setting aside the election,” because it is “not up to the Board staff to seek out evidence that would warrant setting aside the election.” *Sitka Sound Seafoods*, 206 F.3d at 1182; *accord NLRB v. Dobbs House, Inc.*, 613 F.2d 1254, 1256 (5th Cir. 1980).

Moreover, the Company’s argument that the Regional Director was “obligated to investigate” (Br. 40) its pre-election accusation that the Union’s showing of interest was tainted is misplaced. The showing of interest serves a purely administrative function and is used to determine “whether there is sufficient employee interest to warrant the expenditure of the Agency’s time, effort and resources.” *See NLRB Casehandling Manual, Part Two: Representation Proceedings* §§ 11020-21. The case cited by the Company (Br. 40) affirms that *if* a regional director is presented with objective evidence calling into question the validity of a showing of interest, then further administrative investigation may be warranted. *Perdue Farms, Inc.*, 328 NLRB 909, 911 (1999); *see NLRB Casehandling Manual, Part Two: Representation Proceedings* §§ 11021, 11027.1, 11028.1. But the Company failed to present any such objective evidence.⁸

⁸ Despite the lack of any credible allegation that the Union’s showing of interest was somehow tainted, the Regional Director nonetheless *did* conduct an administrative investigation in this case and reasonably concluded that Cappetta was not a statutory supervisor whose conduct could have tainted the showing of interest. (JA.795-96, 1025 n.1.)

More fundamentally, the Company cites no authority for the proposition that a regional director's investigation, or lack thereof, is relevant to any post-election question. In fact, because the showing of interest is merely an administrative tool used to determine whether to commence further proceedings, its validity is not subject to litigation at any stage. *Lampcraft Indus., Inc.*, 127 NLRB 92, 92 n.2 (1960); *see, e.g.*, *Wright Mem'l Hosp. v. NLRB*, 771 F.2d 400, 406-07 (8th Cir. 1985) (citing cases). As the Board found (JA.1025 n.1), the Regional Director properly resolved the Company's claim administratively.

In the past, the Court has described an employer's suggestion that the Court "carefully peruse all election campaign activities (even perfectly lawful conduct) to satisfy itself that there is no taint to the election" as being "outlandish" and in defiance of "both common sense and every known precept governing judicial review of [Board] decisions." *E.N. Bisso & Son*, 84 F.3d at 1445. Indeed, the Court has held that pressing such arguments in order to delay bargaining bordered on "sanctionable conduct." *Id.* at 1445-46. The Company's arguments in the present case are equally meritless.

b. The Regional Director lacked authority to issue post-election investigatory subpoenas

Contrary to the Company (Br. 49-52), the Regional Director did not abuse his discretion in denying the Company's request for the issuance of subpoenas after the election (JA.1025 n.1). As the Regional Director explained (JA.796-97),

he had no authority to issue investigatory subpoenas to the Company in the absence of a post-election objections hearing. Subpoena applications may only be filed with a regional director “before [a] hearing opens” or “prior to [a] hearing.” 29 C.F.R. §§ 102.31(a), 102.66(f), 102.69(c)(1)(iii); *e.g.*, *Imperial Apartment Hotel*, 181 NLRB 391, 391-92 & n.1 (1970) (affirming regional director’s denial of investigatory subpoenas in absence of objections hearing). To permit parties to demand free-standing subpoenas as investigatory tools in their attempts to make preliminary showings of objectionable conduct would create “chaos in the administrative process.” (JA.796.) The Company cites nothing to the contrary. *Cf. Jam Prods.*, 893 F.3d at 1046 (affirming parties are “[w]ithout subpoena power” in the absence of a post-election hearing). Indeed, even in the context of an evidentiary hearing, parties are not entitled to broad subpoenas that would constitute mere “fishing expedition[s].” *Millsboro Nursing & Rehab. Ctr., Inc.*, 327 NLRB 879, 879 n.2 (1999). Here, the Company was unable to make the minimal showing that material issues of fact existed for which the introduction of evidence was warranted, or for which the subpoenas would have been relevant.

In any event, the Company has also failed to demonstrate the prejudice required to establish an abuse of discretion. It rests its argument solely on its inability to subpoena cellphone records that it speculates might have shown “frequent contact between Cappetta and the Union.” (Br. 49.) As the Board noted

(JA.1027), however, the mere fact that a statutory supervisor supports a union is not objectionable. *Harborside Healthcare*, 343 NLRB at 909-10. Thus, even assuming that Cappetta frequently contacted the Union, it would not warrant invalidating the election. *See 800 River Rd.*, 846 F.3d at 386 (reaffirming that no prejudice occurs where “excluded evidence would not compel or persuade to a contrary result”).

c. The Company was not entitled to a finding prior to the election as to Cappetta’s supervisory status

Finally, the Company makes vague allusions to a nonexistent “statutory right to the undivided loyalty of its representatives” (Br. 37-38, 44) in order to argue that the Regional Director erred by not formally making a finding as to Cappetta’s supervisory status prior to the election. Once again, the Company has failed to show either error or actual prejudice. (JA.1025 n.1.)

Under the Board’s Rules and Regulations, the Regional Director was not required to issue a decision on supervisory status prior to the election: the sole purpose of the pre-election proceeding is to determine whether a “question of representation” exists that warrants an election, and the status of a single putative supervisor had no bearing on that question here. (JA.678-79.) *See* 29 U.S.C. § 159(c); 29 C.F.R. §§ 102.64(a), 102.67(a). Furthermore, it has been an accepted practice since the earliest days of the Act to defer final resolution of nondeterminative questions of supervisory status until after an election, and to

permit disputed supervisors to vote under challenge. *See Med. Ctr. at Bowling Green v. NLRB*, 712 F.2d 1091, 1093 (6th Cir. 1983) (upholding challenged-ballot procedure and rejecting employer's claim of "right to utilize supervisors in its opposition to unionization"); *see, e.g., Allied Aviation Serv. Co. of N.J. v. NLRB*, 854 F.3d 55, 60 (D.C. Cir. 2017) (putative supervisors permitted to vote under challenge); *Cocoline Prods., Inc.*, 79 NLRB 1426, 1427 (1948) (same).

In any event, the lack of a ruling caused the Company no prejudice, as the Regional Director explained. (JA.795.) A preliminary finding by a regional director, or even a pre-election finding by the Board on review, would not give the Company the certainty that it demands. *See* 79 Fed. Reg. 74,308, 74,388-89 (Dec. 15, 2014). The Board's decisions are subject to post-election judicial review. Indeed, the Company is still litigating Cappetta's status despite the Board's finding that he was a statutory employee. Moreover, the Company has not shown that its campaign activities would have been altered in any way. The Board ultimately found that Cappetta was not a supervisor, and thus if the Board had delayed the election to make that same finding earlier, it still would not have licensed the Company to treat him as a supervisor in connection with its election campaign.

C. The Regional Director Did Not Otherwise Abuse His Discretion in Applying the Board's Rules and Regulations

The Company has expressly disclaimed any facial challenge to the Board's Rules and Regulations, while confining its arguments to the Regional Director's

allegedly “prejudicial and, at times, irrational application of the Rule[s].” (Br. 4.) Thus, although both the Company and Amici occasionally reference policy disagreements with particular provisions in the Board’s Rules and Regulations, the facial validity of those provisions is not before the Court. Moreover, while the Company and Amici focus particular attention on the Board’s 2014 revisions to its Rules and Regulations, those revisions are not implicated by the majority of the Regional Director’s rulings in this case and have, in any event, been upheld by every court to consider them. *See Associated Builders & Contractors of Tex., Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).⁹

The relevant question here is, as the Company partially acknowledges (Br. 23), whether the Regional Director abused his discretion, to the prejudice of the Company, in applying the Board’s Rules and Regulations. The Court’s review of such claims is “highly deferential.” *AT&T*, 886 F.3d at 1245. To demonstrate

⁹ To the extent that Amici nonetheless attempt to improperly raise generalized challenges to the Board’s Rules and Regulations (e.g., CDW Amici Br. 9-14), those arguments are not fairly encompassed by the as-applied challenges raised by the Company. *See Eldred v. Ashcroft*, 255 F.3d 849, 851 (D.C. Cir. 2001). The factual claims made by Amici are erroneous, and Amici repeat many of the same “dramatic pronouncements . . . predicated on mischaracterizations of [the Board’s 2014 rule revisions],” disregard of regulatory provisions that contradict the intended narrative, and other “misleading” policy assertions that were rejected by the district court in a decision that several Amici declined to appeal to this Court. *Chamber of Commerce*, 118 F. Supp. 3d at 177-78.

an abuse of discretion, the Company bears the burden of proving not only error but also actual prejudice. *Salem Hosp.*, 808 F.3d at 67; *Tasty Baking*, 254 F.3d at 123; *see supra* p. 25.

With respect to the applicable standard of review, it is also necessary to address a number of red herrings raised by the Company and Amicus Chamber of Commerce. (Br. 22-27, Chamber Amicus Br. 1-17.) First, the Supreme Court's opinion in *Auer v. Robbins*, 519 U.S. 452 (1997), is not implicated here, because the Company has not offered a conflicting interpretation of any provision in the Board's Rules and Regulations. As noted, the Company has explicitly limited its arguments to the question of whether the Regional Director's application of the Rules and Regulations constituted an abuse of discretion.

Second, the suggestion that regional directors' decisions are entitled to less deference in general because they are made by "low-level agency employee[s]" rather than the Board (Br. 25, Chamber Amicus Br. 3) simply ignores the law. Based on the expertise of regional directors, and in order to expedite representation proceedings, Congress expressly afforded regional directors the authority to decide representation questions under the Act, with or without review by the Board.

Magnesium Casting Co. v. NLRB, 401 U.S. 137, 138-43 (1971) (citing 29 U.S.C. § 153(b)). Moreover, the Board expressly affirmed the Regional Director's rulings in this case. (JA.1025 n.1.)

Finally, the Company misrepresents the facts by repeatedly claiming that “[m]any of the [Regional Director’s] rulings” (Br. 27) were based on a General Counsel guidance memorandum rather than the Board’s Rules and Regulations. The memorandum in question, like the agency casehandling manual, is not binding on the parties and is merely used to assist regional directors in exercising their discretionary authority. *See, e.g., Starlite Cutting*, 280 NLRB 1071, 1071 n.3 (1986). Its independent validity is irrelevant to this case.

As explained below, the Company has failed to establish that any of the Regional Director’s rulings in this case were arbitrary or, even assuming that they were, that they actually prejudiced the Company. (JA.1025 n.1.)

1. The Regional Director’s decision to partially grant the Company’s postponement motion was reasonable

Despite the Company’s conclusory assertions (Br. 28-32), it never explains how the Regional Director’s application of the Board’s Rules and Regulations in scheduling the pre-election hearing constituted an abuse of discretion (JA.792-95). The Board’s Rules and Regulations instruct regional directors to schedule the pre-election hearing for a date eight days after service of the representation petition. 29 C.F.R. § 102.63(a)(1). The Board’s 2014 rule revisions extended that timeline from the prior minimum-notice requirement of five business days. *Croft Metals, Inc.*, 337 NLRB 688, 688 (2002). Regional directors have discretion to postpone a pre-election hearing for up to two business days “upon request of a party showing

special circumstances.” 29 C.F.R. § 102.63(a)(1). Longer postponements are possible upon request and a showing of “extraordinary circumstances.” 29 C.F.R. § 102.63(a)(1).

In the present case, the Regional Director initially scheduled the pre-election hearing for Friday, December 18. Five days after the hearing was scheduled, on December 15, the Company filed a motion requesting a two-business-day “special circumstances” postponement. (JA.519-21.) In support of its motion, the Company stated that one of the attorneys representing it was traveling and would be unable to meet with company representatives until the following day, December 16, and also vaguely asserted that the Company found it “burdensome” to have to deal with the election petition because the Company was “busy meeting its significant holiday delivery commitments.” (JA.520.) The Company’s motion did not provide any additional explanation.

Contrary to the Company’s claims that it was disadvantaged or mistreated (Br. 31), the Regional Director *granted* in part the Company’s motion, over the opposition of the Union, and postponed the hearing by one business day, resulting in a three-calendar-day extension. (JA.523.) The Company has failed to show that the Regional Director’s ruling was arbitrary, much less to establish actual prejudice stemming from the Regional Director’s failure to extend the pre-election hearing by one additional day, as requested. (JA.792-93, 1025 n.1.) In its brief, the

Company asserts (Br. 6, 29-30) that necessary employee or management witnesses were dispersed, that it was transitioning to a new delivery schedule, that it considered the applicable legal standard unsettled at the time of the hearing, and that it was unable to interview necessary witnesses regarding Cappetta's supervisory status. However, those various post-hoc arguments were never articulated to the Regional Director, and thus his failure to consider them cannot be deemed arbitrary.

In any event, the Company fails to substantiate its claims. For example, it never identifies any specific witnesses who were dispersed or unavailable, and never explains how a new "delivery schedule" would have prevented its upper management or outside counsel from addressing the election petition.¹⁰ Likewise, in the postponement motion actually presented to the Regional Director prior to the hearing, the Company merely stated that it had "significant holiday delivery commitments," without ever explaining the impact those commitments would have on its managers, outside counsel, or ability to prepare for the hearing. Federal law guarantees workers the right to join together to form a union, and an employer

¹⁰ Any possible uncertainty about the applicability of *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011), is immaterial, insofar as the Board and the Regional Director ultimately applied well-established precedent. (JA.1025 n.1, 1133 n.2.) In any event, the Company's ability to prepare for the evidentiary hearing was not affected, given that it claims uncertainty over having to meet a *more* demanding standard for rebutting a single-facility unit.

cannot temporarily suspend that right simply by alleging that it is busy—particularly when the employer is a sizable corporation, like the Company, that is more than capable of preparing for a pre-election hearing in a timely manner. Indeed, the Company ultimately filed a lengthy and detailed statement of position prior to the pre-election hearing (JA.679 n.8; JA.360-92), and the Company was ably represented by counsel at the hearing, where it fully litigated the appropriateness of the unit and Cappetta’s supervisory status.¹¹

The Company makes several vague allusions to its constitutional or statutory due process rights being violated (Br. 1, 21-22, 32), without fully explaining its argument. *See Veritas Health Sys.*, 895 F.3d at 89 (“[T]he procedures available to [an objecting party] are not constitutionally inadequate simply because [that party] opposes the substantive outcome they may produce.”). As an initial matter, the Company has not adequately demonstrated that an employer even enjoys constitutional due process rights in connection with the Board’s pre-election

¹¹ Contrary to the Company (Br. 30-32), the pre-hearing statement of position is irrelevant in this case. The required statement of position is a form that instructs the employer to, *inter alia*, state issues that it “intends to raise at the [pre-election] hearing.” 29 C.F.R. § 102.63(b)(1); *see* JA.360. Employers may be permitted to amend the statement of position “in a timely manner for good cause.” 29 C.F.R. § 102.66(b). Here, the Company did not fail to preserve any issue, and it had an opportunity to refine any written legal arguments at the hearing itself or in its request for review to the Board. (JA.794-95, 798.) Representation hearings are non-adversarial, and the Union did not receive an unfair “advantage” (Br. 31) by having access to the statement of position in advance.

representation proceedings, which are non-adversarial and are designed merely to determine whether a question of representation exists warranting an election. *See Chamber of Commerce*, 118 F. Supp. 3d at 202 (questioning presence of property interest); *see also Inland Empire Dist. Council, Lumber & Sawmill Workers Union v. Millis*, 325 U.S. 697, 706-10 (1945) (holding that constitutional due process does not require any hearing prior to a Board election); *cf.* 5 U.S.C. § 554(a)(6) (excepting Board representation proceedings from the formal adjudication requirements of the Administrative Procedure Act). Assuming, *arguendo*, that such rights are implicated, the eleven-day notice that the Company received in this case was more than adequate. *See* 79 Fed. Reg. 74,308, 74,371-73 (Dec. 15, 2014); *see, e.g.*, *Ungar v. Sarafite*, 376 U.S. 575, 590-91 (1964) (holding five-day notice adequate for criminal contempt hearing where defendant could hire counsel who would be prepared on time and evidence was readily available).

The Company also has not demonstrated that it was denied “an appropriate hearing upon due notice” within the meaning of the Act. 29 U.S.C. § 159(c)(1)(B). Even in the context of adversarial unfair-labor-practice hearings, which typically involve much more complex factual disputes than those at issue here, the Act contemplates hearings within “five days” of a complaint. 29 U.S.C. § 160(b). Tellingly, Congress omitted any similar statutory language setting minimum timelines in the context of non-adversarial representation proceedings, which were

intended to be comparatively expeditious. *See, e.g., Boire*, 376 U.S. at 477-79; *see also* 5 U.S.C. § 554(a)(6). The eleven-day notice in the present case did not contravene any clear statutory mandate.

2. The rulings by the Regional Director and Hearing Officer during the pre-election hearing were reasonable

The Company has also failed to establish error or prejudice with respect to the rulings by the Hearing Officer and Regional Director during the hearing. (JA.1025 n.1.) Contrary to the assertions in its brief (Br. 9, 56-57, 63), the Company was not prevented from introducing any evidence regarding the single-facility unit or Cappetta's supervisory status. Near the end of the hearing, counsel for the Company made a request that the parties reconvene the following morning for the sole purpose of presenting closing statements. (JA.329-30.) The Company did not indicate that it had further witnesses to call or evidence to present, and it identifies no such evidence now. The Hearing Officer's suggestions that the Company produce certain documents (JA.36-37, 200-01, 296) were not adverse rulings, and the Company cannot claim prejudice from its failure to present evidence on its own behalf at the hearing.

The hearing itself was a little over eight hours long. (JA.794.) Although the Company now complains (Br. 33-34) that the Hearing Officer unreasonably extended the hearing to finish receiving evidence in one day, the Company never specifically objected to the Hearing Officer's decision to continue the hearing past

6:00 p.m. Approximately fifty minutes before a final recess was called to allow the parties to prepare closing statements, as the Union was preparing to call its final witness, counsel for the Company asked the Hearing Officer “[h]ow late [she] planned to go.” (JA.294-95, 331.) The Hearing Officer stated that her preference was to finish the hearing that evening if possible. (JA.295.) Counsel for the Company indicated that he was willing to resume the hearing the following day, but he did not specifically object to the Hearing Officer’s decision to continue the hearing past 6:00 p.m. (JA.294-329.)

As noted, counsel for the Company later requested that the parties reconvene the following morning for the sole purpose of presenting closing statements, and the Hearing Officer reasonably denied that request. (JA.329-30.) The Board’s Rules and Regulations do not even definitively require a recess prior to parties presenting closing statements, *see* 29 C.F.R. § 102.66(h) (affording parties a “reasonable period” to *present* the closing statements), and yet the Hearing Officer gave both parties a thirty-minute recess to prepare, then offered additional time when they reconvened (JA.794; JA.330-31). The Union presented a substantive closing statement on the merits of the case, but the Company elected to use its allotted time to argue that it was being treated unfairly. (JA.329-50.)

Finally, the Regional Director had discretion over whether to allow post-hearing briefing, and reasonably concluded that it was not warranted given the

relatively straightforward nature of this case. (JA.794-95.) Contrary to the Company (Br. 36-37), the Hearing Officer made clear at the beginning of the hearing that post-hearing briefing would not be allowed *unless* the parties secured special permission from the Regional Director (JA.12). *See* 29 C.F.R. § 102.66(h); *cf.* 5 U.S.C. § 554(a)(6) (excepting representation proceedings from privileges of formal adjudications, such as written briefs). Moreover, the Company cannot show prejudice where it had a subsequent opportunity to file a written request for review to the Board.

3. The Regional Director's decision to direct a mail-ballot election was reasonable

The Company next fails to show any legal error or prejudice stemming from the Regional Director's choice of a mail-ballot election. Regional directors are afforded broad discretion to determine the time and manner of an election, subject to Board review for a clear abuse of discretion. 29 C.F.R. § 102.67(b); *Nouveau Elevator Indus., Inc.*, 326 NLRB 470, 471 (1998); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367-68 (1954). The Board's Rules and Regulations permit parties to state their positions at the pre-election hearing regarding the type, date, time, and location of an election, but do not permit parties to litigate such matters. 29 C.F.R. § 102.66(g)(1). Given the discretion entrusted to the Board by Congress, the choice of a mail-ballot election must be upheld as long as it was not arbitrary,

even if the Court would have selected a different kind of election. *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002).

The Board has consistently affirmed that mail-ballot elections are proper where eligible voters are “scattered” over a wide geographic area or across varying work schedules, such as when employees “work different shifts” or “travel on the road.” *San Diego Gas & Elec.*, 325 NLRB 1143, 1145 & n.7 (1998). Here, as the Regional Director explained (JA.680), the Company’s drivers had widely varying and uncertain schedules, they were not normally present at a common place at a common time, and a manual election would have required them to rely on the Company or its customer to specially rearrange their work schedules. Moreover, some drivers would have had to travel long distances during uncertain traffic and winter weather conditions in order to vote. Under such circumstances, a mail-ballot election was perfectly reasonable. *See Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1127 (D.C. Cir. 1996) (upholding decision to conduct mail-ballot election where manual election would have required employees to modify normal work schedules and spend significant time and effort traveling to vote); *cf. Nouveau Elevator Indus.*, 326 NLRB at 471 (upholding regional director’s direction of manual election under similar circumstances but indicating mail-ballot election would have been preferable).

The Regional Director also did not abuse his discretion by declining to adopt the Company’s “revised” manual-election proposal (Br. 46-47). The Company revised its proposal at the last minute, on January 7, with no explanation as to why such proposal had not been presented at the pre-election hearing. (JA.796.) *But see* 29 C.F.R. 102.66(g) (granting parties limited opportunity to present positions as to election details at pre-election hearing). By then, the notice of election had already been sent to the parties. (JA.681-86.) *See* 29 C.F.R. § 102.67(b). Modifying the election details or issuing a second notice of election at that point would have risked sowing confusion among voters or the parties themselves. (JA.694-95, 796.) Furthermore, a mail-ballot election remained preferable for essentially the same reasons.

Contrary to the Company, the Regional Director’s decision in this case does not mean that manual elections “[cannot] be held in the transportation industry.” (Br. 46.) Even if a manual election may have also been reasonable on these or similar facts, *see Nouveau Elevator Indus.*, 326 NLRB at 471, the appropriate inquiry is whether the Regional Director abused his discretion. In any event, a claim of actual prejudice is foreclosed in this case due to the fact that thirty out of thirty-two eligible voters ultimately cast ballots in the election, and the two employees who did not cast ballots could not have affected the outcome. (JA.796.)

Thus, traditional concerns about reduced voter participation are inapposite. *See Kwik Care*, 82 F.3d at 1127.

Insofar as the Company suggests that the mail-ballot procedure violated its purported “statutory right to campaign” (Br. 48), that argument is without merit. By its terms, Section 8(c) of the Act merely prohibits the Board from finding certain types of conduct to constitute evidence of unfair labor practices. 29 U.S.C. § 158(c). It does not affirmatively grant employers rights that are, for example, enforceable in representation proceedings. *See Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.19 (D.C. Cir. 2013); *Rosewood Mfg. Co.*, 263 NLRB 420, 420 (1982).

Moreover, to the extent that the Company is arguing more generally that the mail-ballot election gave it inadequate time to campaign, the Company’s argument is misleading and illogical. Under Board law, both employers and unions are prohibited from holding mass captive-audience meetings after a designated point in time prior to the start of an election, but they are not prohibited from continuing to campaign for or against unionization. *San Diego Gas*, 325 NLRB at 1146. Whether the date on which mass captive-audience meetings must cease corresponds to the start of a *manual* election or the start of a *mail-ballot* election is immaterial. Here, the Company’s own election proposals requested a manual election on a date in January to be chosen by the Regional Director (JA.326-27,

691), and a manual election could have been scheduled on the same date that the mail-ballot election began. Furthermore, the Company had a full *month* after the date on which the Union’s petition was filed to hold mass captive-audience meetings and to otherwise campaign against the Union prior to the start of the election.

4. The Regional Director reasonably declined to resolve the status of two disputed classifications prior to certification

In attempting to manufacture a final challenge to the Board’s decision, the Company argues (Br. 52-56) that the Regional Director abused his discretion by declining to resolve whether two employees in disputed job classifications, who also regularly spend part of their time as drivers, should be excluded from the unit. Once again, the Company inexplicably fails to acknowledge well-settled precedent. As the Board indicated (JA.1135 n.5), it has been an established procedure for decades that when employees in certain job classifications are permitted to vote under challenge, and their challenged ballots are ultimately not determinative of the election outcome, then those classifications are neither included in nor excluded from the unit. *See, e.g., Kirkhill Rubber Co.*, 306 NLRB 559, 559 & n.2 (1992). Instead, the status of the disputed classifications can be resolved by the parties through the collective-bargaining process, or through either party filing a unit-clarification petition with the Board. *DIC Entm’t, LP*, 329 NLRB 932, 932 n.2 (1999), *enforced*, 238 F.3d 434 (D.C. Cir. 2001); *see* 29 C.F.R. § 102.60(b)

(providing for unit-clarification petitions); *Med. Ctr. at Bowling Green*, 712 F.2d at 1093; *see also Lakeside Cnty. Hosp., Inc. v. NLRB*, 8 F.3d 71 (D.C. Cir. 1993) (unpublished). The Company has refused to engage in bargaining with the Union now for several years, and it has declined to file a petition to clarify the scope of the unit. Thus, the Company cannot now complain to the Court that the scope of the unit is unclear.¹²

There was nothing arbitrary about the Regional Director's application of the established procedure here, where the Company challenged the status of just two employees, and where, not counting those two challenged ballots, the Union won the election by a decisive vote of 27 to 1. *See* 29 C.F.R. § 102.69(b) (requiring immediate certification of election results in absence of determinative number of challenged ballots). Withholding certification of the Union pending litigation of two employees' status would have served no purpose other than to facilitate the Company's efforts to delay bargaining with the Union. By contrast, had the Company bargained with the Union, as it has been legally obligated to do since the

¹² The Company and Amici cite inapposite cases (Br. 55 n.8, CDW Amici Br. 18-19) in which certified units differed dramatically from the unit descriptions voted on by employees. Here, by contrast, the notice of election explained that the inclusion of the two challenged employees would only be resolved, as necessary, after the election. (JA.685.) *See Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55-56 (2d Cir. 1992) (explaining inapplicability of cited cases where notice of election "alert[s] employees to the possibility of change").

Union was certified in March 2016, such bargaining could have led to an amicable resolution regarding the disputed classifications.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
February 2019

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UPS GROUND FREIGHT, INC.)
)
 Petitioner/Cross-Respondent)
)
 v.)
)
 NATIONAL LABOR RELATIONS BOARD) Nos. 18-1161 &
) 18-1182
 Respondent/Cross-Petitioner)
)
 and)
)
 INTERNATIONAL BROTHERHOOD OF TEAMSTERS,) Board No.
 LOCAL UNION NO. 773) 04-CA-205359
)
 Intervenor)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its final brief contains 12,821 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

Dated at Washington, D.C.
this 13th day of February, 2019

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)
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Intervenor)

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/David Habenstreit
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1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
this 13th day of February, 2019

STATUTORY ADDENDUM

Except for the following, all pertinent statutes and regulations are contained in the statutory addendum to the Company's opening brief to the Court.

Federal Statutes	Page(s)
Administrative Procedure Act (5 U.S.C. §§ 500 <i>et seq.</i>)	
5 U.S.C. § 554(a)(6).....	i

Rules and Regulations

29 C.F.R. § 102.60(b)	iii
29 C.F.R. § 102.61(a)(7)	iii
29 C.F.R. § 102.61(f)	iv

5 U.S.C. § 554

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

- (1) a matter subject to a subsequent trial of the law and the facts *de novo* in a court;
- (2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;
- (3) proceedings in which decisions rest solely on inspections, tests, or elections;
- (4) the conduct of military or foreign affairs functions;
- (5) cases in which an agency is acting as an agent for a court; or
- (6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

- (1) the time, place, and nature of the hearing;

- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

29 C.F.R. § 102.60(b)

(b) Petition for clarification of bargaining unit or petition for amendment of certification. A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question of representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

29 C.F.R. § 102.61(a)

(a) RC Petitions. A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed

with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(12) The type, date(s), time(s) and location(s) of the election sought.

29 C.F.R. § 102.61(f)

(f) Provision of original signatures. Evidence filed pursuant to paragraphs (a)(7), (b)(8), or (c)(8) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than 2 days after the facsimile or electronic filing.